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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JEREMIAH REVITCH, individually and
on behalf of all others similarly situated,

Plaintiff,

v.

NEW MOOSEJAW, LLC and
NAVISTONE, INC.,

Defendants.

Case No. 3:18-cv-06827-VC

**SECOND AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

1 Plaintiff Jeremiah Revitch (“Plaintiff”), individually and on behalf of himself and all others
 2 similarly situated, by and through his attorneys, makes the following allegations pursuant to the
 3 investigation of his counsel and based upon information and belief, except as to allegations
 4 specifically pertaining to himself and his counsel, which are based on personal knowledge.

5 **NATURE OF THE ACTION**

6 1. This is a class action suit brought against Defendants New Moosejaw, LLC
 7 (“Moosejaw”) and NaviStone, Inc. (“NaviStone”) (collectively, “Defendants”) for wiretapping the
 8 computers of visitors to Defendant Moosejaw’s website, Moosejaw.com. The wiretaps, which are
 9 secretly embedded in the computer code on Moosejaw.com, are used by Defendants to scan the
 10 user’s computer in search of files that can be used to de-anonymize and identify the user, and also to
 11 observe visitors’ keystrokes, mouse clicks,¹ and other electronic communications in real time for the
 12 purpose of gathering Personally Identifiable Information (“PII”) to de-anonymize those visitors –
 13 that is, to match previously unidentifiable website visitors to obtain their names and home
 14 addresses, along with detailed data concerning their browsing habits. These wiretaps enable
 15 Defendants to immediately, automatically, and secretly observe the keystrokes, mouse clicks, and
 16 other electronic communications of visitors regardless of whether the visitor ultimately makes a
 17 purchase from Moosejaw. By doing so, Defendants have violated the California Invasion of
 18 Privacy Act (“CIPA”), Cal. Penal Code §§ 631, 632, and 635; have invaded Plaintiff’s privacy
 19 rights in violation of the California Constitution; have intruded upon the seclusion of Plaintiff; have
 20 violated California’s Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.*; and have
 21 committed other tortious acts as described herein.

22 2. On several occasions prior to the filing of this lawsuit, Plaintiff Revitch visited
 23 Moosejaw.com. During each of Plaintiff’s visits Defendants scanned his device for files that could
 24 be used to de-anonymize and identify him, captured his electronic communications and redirected
 25 them to NaviStone in real time, and used the intercepted data to attempt to learn his identity, postal
 26 address, and other PII.

27 ¹ As used herein, the term “mouse clicks” also refers to “touch gestures” such as the “tap,” “swipe,”
 28 and similar gestures used on touchscreen devices.

1 3. Specifically, when browsing Moosejaw.com during the relevant time period,
2 Plaintiff Revitch previously had a cookie placed on his computer from AGKN.com, also known as
3 Aggregate Knowledge, a third-party data broker. This is not an ordinary cookie – it is linked to a
4 database of real-life names, addresses, contact information, browsing habits, and other PII. In turn,
5 upon visiting Moosejaw.com, Defendants’ wiretaps scanned Plaintiff Revitch’s computer, located
6 the AGKN.com cookie, and coordinated with Aggregate Knowledge to de-anonymize Plaintiff
7 Revitch. *See infra*, at “Defendants’ Practice of Scanning Visitors’ Computers for De-Anonymizing
8 Files.”

9 4. Furthermore, Plaintiff Revitch visited the “Registration” and “Sign In” pages on
10 Moosejaw.com during the relevant time period. Plaintiff Revitch also reviewed the “Shipping and
11 Billing Policy” and the “Return and Exchange Policy.” Plaintiff Revitch also browsed the
12 following items on Moosejaw.com: Patagonia Men’s R0 Sun Hoody, Patagonia Men’s Insulated
13 Fjord Flannel Jacket, Patagonia Bandana Blue Fjord Insulated, Hestra Juniors’ Heli Ski 3 Finger
14 Glove, Crescent Moon EVA The All Foam Snowshoe, Patagonia Men’s Tropic Comfort Hoody II,
15 Patagonia Men’s RD Long-Sleeved Sun Tee, Icebreaker Men’s Pursuit Legless, Five Ten Men’s
16 Freerider Shoe, Five Ten Men’s Freerider Contact Shoe, and Five Ten Kids’ Freerider Shoe.
17 Plaintiff Revitch also viewed a page listing items subject to the “Icebreaker Sale.”

18 5. Mr. Revitch visited Moosejaw.com numerous times in 2017, including on January 8,
19 March 1, several days in April, August 10, and December 8.

20 6. When conducting these browsing activities, Plaintiff Revitch’s key strokes, mouse
21 clicks, and other information were observed by Defendants’ wiretaps in real time. For example,
22 Defendants’ wiretaps collected the data typed by Plaintiff Revitch into the online forms on
23 Moosejaw.com in real time. *See infra*, at “NaviStone’s Wiretaps in Action at Moosejaw.com.”

24 7. In *Brady Cohen v. New Moosejaw, LLC*, Case No. 1:17-cv-09389-WHP (S.D.N.Y.),
25 a resident and citizen of New York, plaintiff Brady Cohen, brought claims under New York law
26 based on substantially similar facts. In its order dismissing Mr. Cohen’s claims, the court noted that
27 Mr. Cohen’s allegations were “unsettling,” “disturbing,” and “troubling,” but the alleged conduct
28 nonetheless “does not violate any of the [New York] statutes on which Cohen predicates his

1 claims.” Here, Plaintiff Revitch is now bringing claims under California’s privacy laws.

2 8. Plaintiff brings this action on behalf of himself and a class of all persons whose
3 electronic communications were intercepted through the use of NaviStone’s wiretap on
4 Moosejaw.com.

5 **THE PARTIES**

6 9. Plaintiff Jeremiah Revitch is a natural person and citizen of the State of California who
7 resides in Mill Valley, California. Throughout 2017, Mr. Revitch browsed Defendant Moosejaw’s
8 website at Moosejaw.com. During each of these visits, Mr. Revitch browsed Moosejaw.com
9 because he intended to purchase outerwear. Although Mr. Revitch never consented to any
10 interception, disclosure or use of his electronic communications, Mr. Revitch’s keystrokes, mouse
11 clicks, and other electronic communications were intercepted in real time and were disclosed to
12 NaviStone through Moosejaw’s use of NaviStone’s wiretap. In doing so, Defendants gathered Mr.
13 Revitch’s PII, including his keystrokes, mouse clicks, and other electronic communications.
14 Defendants also scanned Mr. Revitch’s computer in search of files that could be used to de-
15 anonymize him. As a result of these activities, Defendants then de-anonymized and identified Mr.
16 Revitch as a visitor to Moosejaw.com. Mr. Revitch was unaware at the time that his keystrokes,
17 mouse clicks, and other electronic communications were being intercepted and disclosed to a third
18 party. Mr. Revitch learned of these facts in December 2017. Mr. Revitch had a reasonable
19 expectation of privacy when browsing Moosejaw.com, in that he never expected that his keystrokes,
20 mouse clicks, and other electronic communications were being intercepted and disclosed to a third
21 party, or that Defendants would de-anonymize and identify him as a result of his browsing.

22 10. Defendant New Moosejaw, LLC is a Delaware limited liability company with its
23 principal place of business at 32200 North Avis Suite 100, Madison Heights, Michigan. Moosejaw
24 does business throughout California and the entire United States. “Moosejaw is a leading online
25 active outdoor retailer with a large web presence as well at 10 physical stores.”² “Moosejaw carries
26 more than 400 brands, including Patagonia, The North Face, Marmot, Arc’teryx and more.

27 _____
28 ² <https://news.walmart.com/2017/02/15/walmart-announces-the-acquisition-of-moosejaw-a-leading-online-outdoor-retailer>

1 [Moosejaw] ha[s] an extensive assortment of apparel and gear for climbing, hiking, camping, snow
2 sports, yoga, swimming and biking.”³

3 11. Defendant NaviStone, Inc. is a Delaware corporation with its principal place of
4 business at 1308 Race Street, Cincinnati, Ohio 45202. NaviStone does business throughout
5 California and the entire United States. NaviStone is an online marketing company and data broker
6 that deals in U.S. consumer data.

7 **JURISDICTION AND VENUE**

8 12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A)
9 because this case is a class action where there are more than 100 members in the Class, the
10 aggregate claims of all members of the proposed class are in excess of \$5,000,000.00, exclusive of
11 interest and costs, and Plaintiff, together with most members of the proposed class, are citizens of
12 states different from Defendants.

13 13. This Court has personal jurisdiction over Defendants because they have continuous
14 and systematic contacts with the State of California as to essentially render them “at home” in this
15 State. Moreover, each of the Defendants have purposefully availed themselves of the laws and
16 benefits of doing business in this State, and Plaintiff’s claims arise out of each of the Defendants’
17 forum-related activities. Furthermore, a substantial portion of the events giving rise to Plaintiff’s
18 claims occurred in this District.

19 14. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a
20 substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this
21 District. Moreover, Plaintiff resides in this District.

22 **FACTS COMMON TO ALL CLAIMS**

23 **Overview Of NaviStone’s Wiretaps**

24 15. Defendant NaviStone is a marketing company and data broker that deals in U.S.
25 consumer data. NaviStone’s business model involves entering into voluntary partnerships with
26 various e-commerce websites. Upon partnering with NaviStone, these e-commerce websites will
27

28 ³ *Id.*

1 agree to insert a small parcel of computer code into their websites, which is provided by NaviStone
2 (and is written by NaviStone). This small parcel of computer code serves as a so-called “back
3 door” in computer terminology – its function is to retrieve and execute a much larger portion of
4 JavaScript code that is remotely hosted on NaviStone’s servers. As NaviStone explains on
5 navistone.com, “[a]dding a simple line of code to each page of your website enables a wealth of
6 new marketing data.”

7 16. This “back door” code permits NaviStone to execute its own computer code on the
8 websites of its e-commerce partners. Stated otherwise, the “simple line of code” that NaviStone
9 requests its partners add “to each page of [their] website[s]” serves to call and execute remote
10 computer code that is: (i) provided by NaviStone, (ii) written by NaviStone, and (iii) hosted on a
11 remote server by NaviStone.

12 17. As currently deployed, NaviStone’s remote code functions as a wiretap. That is,
13 when connecting to a website that runs this remote code from NaviStone, a visitor’s IP address and
14 other PII is sent to NaviStone in real-time. NaviStone’s code also scans the visitor’s computer for
15 data files that could reveal the visitor’s identity. NaviStone’s code will also spy on the visitor as he
16 or she browses the website, capturing and redirecting the visitor’s keystrokes, mouse clicks and
17 other electronic communications to NaviStone. This real-time interception and transmission of
18 visitors’ electronic communications begins as soon as the visitor loads Moosejaw.com into their
19 web browser. The intercepted communications include, among other things, information typed on
20 forms located on Moosejaw.com, regardless of whether the user completes the form or clicks
21 “Submit.” NaviStone then uses this information to attempt to de-anonymize website visitors.

22 18. NaviStone coordinates with additional entities who maintain back-end databases
23 containing data and profiles on consumers across the U.S., which includes consumers’ names and
24 mailing addresses. As users browse the various e-commerce websites that deploy NaviStone code,
25 NaviStone attempts to “match” elements of the intercepted data with records of real-life people
26 maintained in the back-end databases. Once a match is found, NaviStone de-anonymizes the user
27 and updates the back-end databases with the user’s current browsing activities and PII.

28 19. NaviStone has partnered with hundreds e-commerce websites since beginning its

1 operations. By combining and correlating its data, NaviStone can watch consumers as they browse
2 hundreds of participating e-commerce sites, in real-time.

3 20. Pursuant to an agreement with NaviStone, Moosejaw intentionally embedded
4 NaviStone's software coded wiretaps on Moosejaw.com in order to scan visitors' computers for
5 files that could be used to identify them, and also to intercept visitors' communications to obtain de-
6 anonymized PII of visitors to Moosejaw's website.

7 21. NaviStone obfuscates the wiretap codes through dummy domains to attempt to
8 conceal its activities. For example, part of NaviStone's remote code running on the Moosejaw
9 website was located at <http://code.murdoog.com/onetag/C1DFC24D045BDD.js>.

10 22. On June 20, 2017, a leading tech news website, gizmodo.com, published an exposé
11 on NaviStone's wiretaps entitled "Before You Hit 'Submit,' This Company Has Already Logged
12 Your Personal Data."⁴ The Gizmodo article describes NaviStone as "a company that advertises its
13 ability to unmask anonymous website visitors and figure out their home addresses."⁵ The article
14 revealed that NaviStone is "in the business of identifying 'ready to engage' customers and matching
15 'previously anonymous website visitors to postal names and addresses.' [NaviStone] says it can
16 send postcards to the homes of anonymous website shoppers within a day or two of their visit, and
17 that it's capable of matching '60-70% of your anonymous site traffic to Postal names and
18 addresses.'"⁶

19 23. Indeed, on its own website, NaviStone boasts that it "invented progressive website
20 visitor tracking technology," which allows it to "reach [] previously unidentifiable website
21 visitors."⁷ According to NaviStone, "[b]y simply adding one line of code to each website page, you
22 can unlock a new universe of 'ready to engage' customers."⁸

23 24. NaviStone also explains how to implement this software wiretaps on its clients'

24 _____
25 ⁴ <https://gizmodo.com/before-you-hit-submit-this-company-has-already-logge-1795906081>

26 ⁵ *Id.*

27 ⁶ *Id.*

28 ⁷ <https://www.navistone.com/>

⁸ *Id.*

1 webpages:

- 2 1: Insert One Line Of Code On Each Webpage.
3 We'll provide you and your IT team with a short tracking code
4 (and instructions) to insert on *each page* of your website.
5 Data collection begins immediately and is reviewed for quality
6 by our staff.
- 7 2: Identify Engaged Website Visitors.
8 Data is stored in a secure environment specifically dedicated
9 to your company's information. Website visitors are
10 identified as direct marketing prospects or reactivation targets
11 based on their level of engagement on your site, as identified
12 by unique algorithms developed by our data scientists.
- 13 3: Identify Verified Names and Addresses.
14 When unidentified website visitors show an intent to purchase
15 based on the modeling process described above, NaviStone®
16 will secure postal names and addresses to include in your
17 direct marketing prospecting and reactivation programs. ...
- 18 4: Use, Expand, Repeat.
19 NaviStone® will continue to track website behavior to identify
20 new, unique prospects and reactivation targets so you can
21 expand and optimize this unique process for success time and
22 time again.⁹

23 25. NaviStone's wiretaps intercept communications in real time. As *Gizmodo* put it,
24 "before you hit 'submit,' this company has already logged your personal data."¹⁰ *Consumerist* also
25 shared the same concern: "these forms collect your data even if you don't hit 'submit.'"¹¹

26 26. NaviStone's wiretaps are engaged as soon as the visitor arrives at Moosejaw.com.
27 By merely loading the main page on Moosejaw.com, with no other action, the visitor is connected
28 to NaviStone's wiretaps, which scan visitors' computers for identifying information, and also
intercept and monitor their communications.

29 27. Since NaviStone's wiretaps engage as soon as the visitor arrives at the main page of
Moosejaw.com, website visitors are not provided with an opportunity to review any privacy

30 ⁹ <https://www.navistone.com/how-it-works>

31 ¹⁰ <https://gizmodo.com/before-you-hit-submit-this-company-has-already-logge-1795906081>

32 ¹¹ <https://consumerist.com/2017/06/29/these-forms-collect-your-data-even-if-you-dont-hit-submit/>

1 policies or disclosures prior to deployment of the wiretaps. By the time a user reaches the privacy
2 policy, the wiretaps have already been deployed, and the de-anonymization has already occurred.

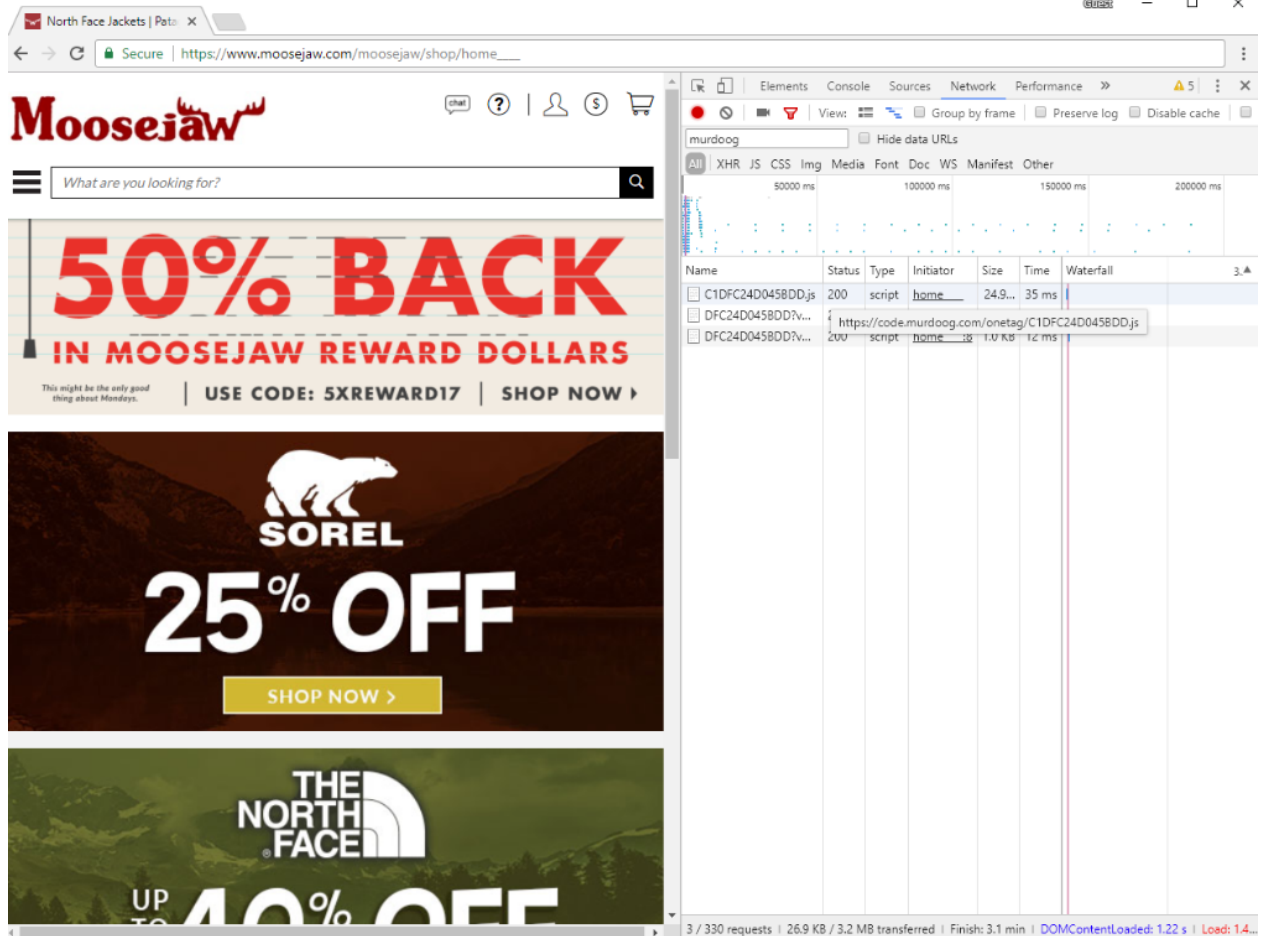
3 28. As the visitor interacts with Moosejaw.com, for example, by adding an item to a
4 shopping cart, typing information onto a form, viewing an item, etc., all of these communications
5 are captured and redirected to NaviStone in real time, through the wiretaps. Indeed, as will be
6 demonstrated below, when NaviStone's code is deployed on a webpage that contains an online
7 form – such as a “sign up” page or an “account registration” page – the data is captured and
8 redirected to NaviStone as it is typed. Visitors do not need click “Submit” on the form, or take any
9 other action, for their communications to be intercepted and disclosed to NaviStone.

10 29. NaviStone's wiretaps are deployed on hundreds of e-commerce websites. Upon
11 information and belief, NaviStone maintains and correlates its back-end database of User Data and
12 PII across these hundreds of websites. For example, assume that Site X and Site Y are both running
13 NaviStone's wiretaps. Now, assume that a user provides her name and phone number to Site X, but
14 not to Site Y. Through the use of NaviStone's wiretaps and back-end database, NaviStone can de-
15 anonymize the user on Site Y and know her name and phone number, even though she never
16 provided that information to Site Y.

17 **NaviStone's Wiretaps In Action On Moosejaw.com**

18 30. Some aspects of the operation of NaviStone's wiretaps on the Moosejaw.com
19 website can be observed using the Developer Tools Window in the Google Chrome browser. In the
20 images below, the Moosejaw.com website, as it appears normally through the browser is shown in
21 the left-hand side of the window, while the Developer Tools Network View, showing incoming and
22 outgoing transmissions, is shown in the right-hand window.

31. When Moosejaw.com is loaded into a browser, the website automatically retrieves a computer file located on a remote server. One such example is the computer file named “C1DFC24D045BDD.js,” which was hosted at <http://code.murdoog.com/onetag/>



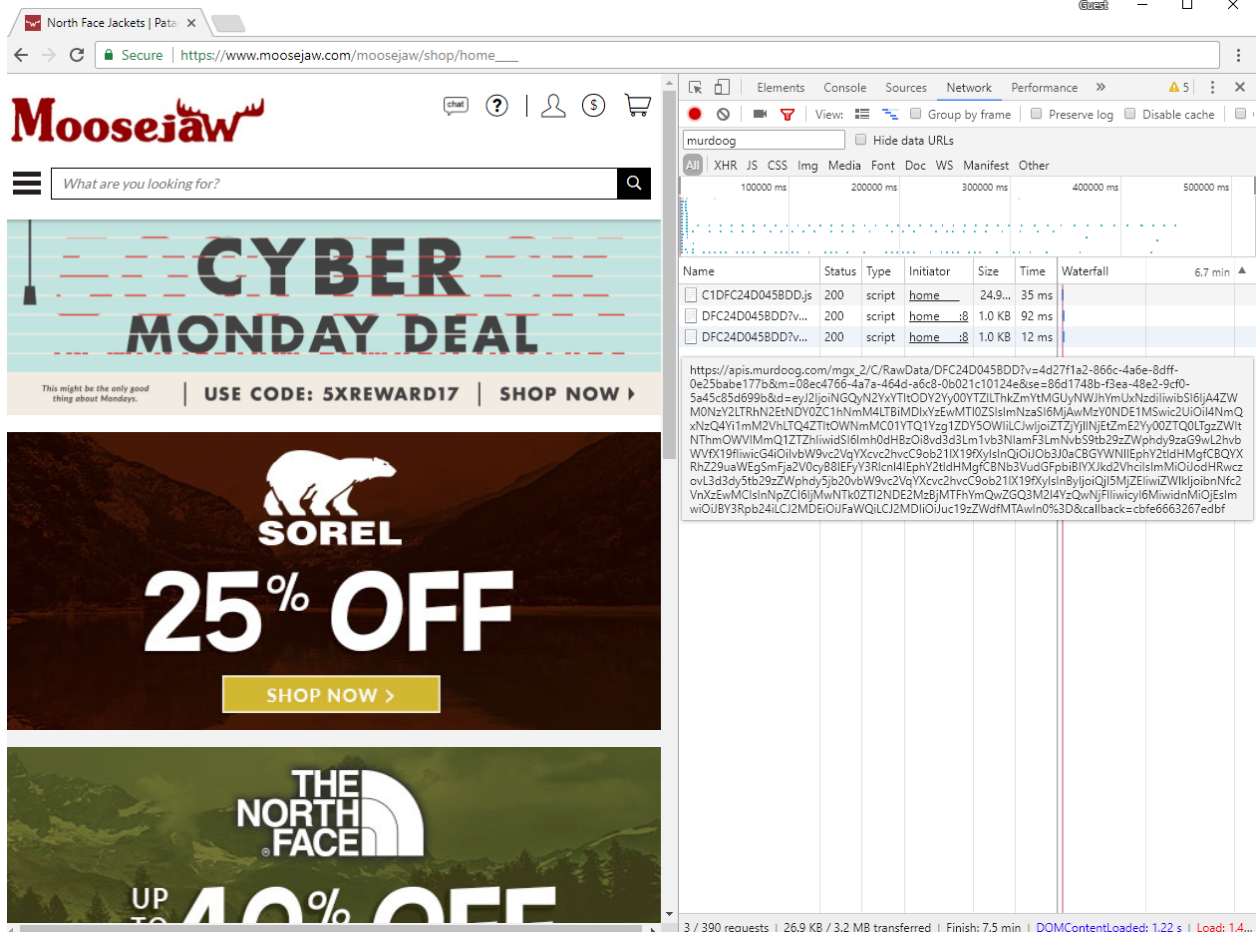
32. The file “C1DFC24D045BDD.js” is 24.9 KB in size and contains computer code written in a language called JavaScript. It appears as such:

[illegible]

The top line of the code contains a comment indicating that it is to be used on “Moosejaw.com.” However, the remainder of the code lacks comments, explanations, proper indenting, or intelligible names for variables. Essentially, this code is obfuscated.

33. The domain “code.murdoog.com,” which deploys this code, is owned and operated by NaviStone.

34. Next, the code in C1DFC24D045BDD.js is executed, with no further actions by the user, or prompting by Moosejaw or NaviStone. This immediately begins intercepting the visitors' electronic communications and transmitting them to <https://apis.murdoog.com/>



35. The domain “apis.murdoog.com” is also owned and operated by NaviStone.

36. The intercepted communications are encoded in a format called Base64. When decoded, they appear as such:

```
{
  "v": "4d27f1a2-866c-4a6e-8dff-0e25babe177b",
  "m": "08ec4766-4a7a-464d-a6c8-0b021c10124e",
  "csi": "2003644151",
  "se": "86d1748b-f3ea-48e2-9cf0-5a45c85d699b",
  "p": "e6cb9e61-fa6c-4e44-83eb-58f9ee2d5e6a",
  "u": "https://www.moosejaw.com/moosejaw/shop/home____",
  "pn": "/moosejaw/shop/home____",
  "t": "North Face Jackets | Patagonia Jackets | Arcteryx Jackets | Mountain Hardwear",
  "c": "https://www.moosejaw.com/moosejaw/shop/home____",
  "pr": "B2926D",
  "eid": "ns_seg_100",
  "sid": "30594e2641630c11abd0dd73b8c4061e",
  "s": 2,
  "vs": 1,
  "l": "Action",
  "v01": "Eid",
  "v02": "ns_seg_100"
}
```


Based on information and belief, other portions of these intercepted data (which are obfuscated such that they are machine-readable but are not readable by humans) include a timestamp, an ID number, the user's IP address, and other PII.

37. NaviStone's wiretap also monitors the user as he or she browses Moosejaw.com. The wiretaps will report every page visited by the user and any items the user added to his or her online shopping cart. Assume that a visitor is interested in a "Moosejaw Men's The Jack Pullover Hoodie," and adds it to his or her shopping cart:

The screenshot shows a web browser window displaying the Moosejaw website. A notification banner at the top says "Nice One! You just added this item to your cart." Below this, the shopping cart is visible, showing a "Moosejaw Men's The Jack Pullover Hoodie" in size Medium, color Shale, for \$50.00. The order summary shows a subtotal of \$150.00, shipping is free, and the order total is \$150.00. The user has earned \$15.00. There are buttons for "View/Edit Cart", "Express Checkout", and "Pay With PayPal".

Overlaid on the right side of the browser window is the Chrome DevTools Network tab. It shows a list of network requests, with the selected request being a script file named "C1DFC24D0458DD7v...". The request details show a 200 status, a script type, and a size of 1.0 KB. The response body is visible, showing a JSON object with various fields, including "v", "m", "csi", "se", "p", "u", "r", "t", and "c". The "c" field contains a URL: "https://www.moosejaw.com/moosejaw/shop/pro".

This activity is immediately communicated to NaviStone as such:

```
{
  "v": "4d27f1a2-866c-4a6e-8dff-0e25babe177b",
  "m": "08ec4766-4a7a-464d-a6c8-0b021c10124e",
  "csi": "1841982919",
  "se": "86d1748b-f3ea-48e2-9cf0-5a45c85d699b",
  "p": "74ff4509-26a4-4c4c-88ce-68a9e3793d7a",
  "u": "https://www.moosejaw.com/moosejaw/shop/product_Moosejaw-Men-s-The-Jack-Pullover-Hoody_10273018_10208_10000001_1_",
  "pn": "/moosejaw/shop/product_Moosejaw-Men-s-The-Jack-Pullover-Hoody_10273018_10208_10000001_1_",
  "r": "https://www.moosejaw.com/moosejaw/shop/search_Mens-Hoodies____",
  "t": "Moosejaw Men's The Jack Pullover Hoodie - at Moosejaw.com",
  "c": "https://www.moosejaw.com/moosejaw/shop/pro"
}
```

duct_Moosejaw-Men-s-The-Jack-Pullover-
 Hoody_10273018_10208_10000001_-
 1_,"pr":"B2926D","eid":"ns_seg_100","sid":"30594e2641630c11abd
 Odd73b8c4061e","s":3,"vs":7,"l":"Action","v01":"AddToCart","v03":
 "CartClick","v04":"/moosejaw/shop/product_Moosejaw-Men-s-The-
 Jack-Pullover-Hoody_10273018_10208_10000001_-1_"}qem\$g

38. When filling out forms, any PII the user provides is immediately, automatically, and secretly transmitted to NaviStone in real-time. Here, the user has just arrived on the “Checkout” page, and has not entered any information yet:

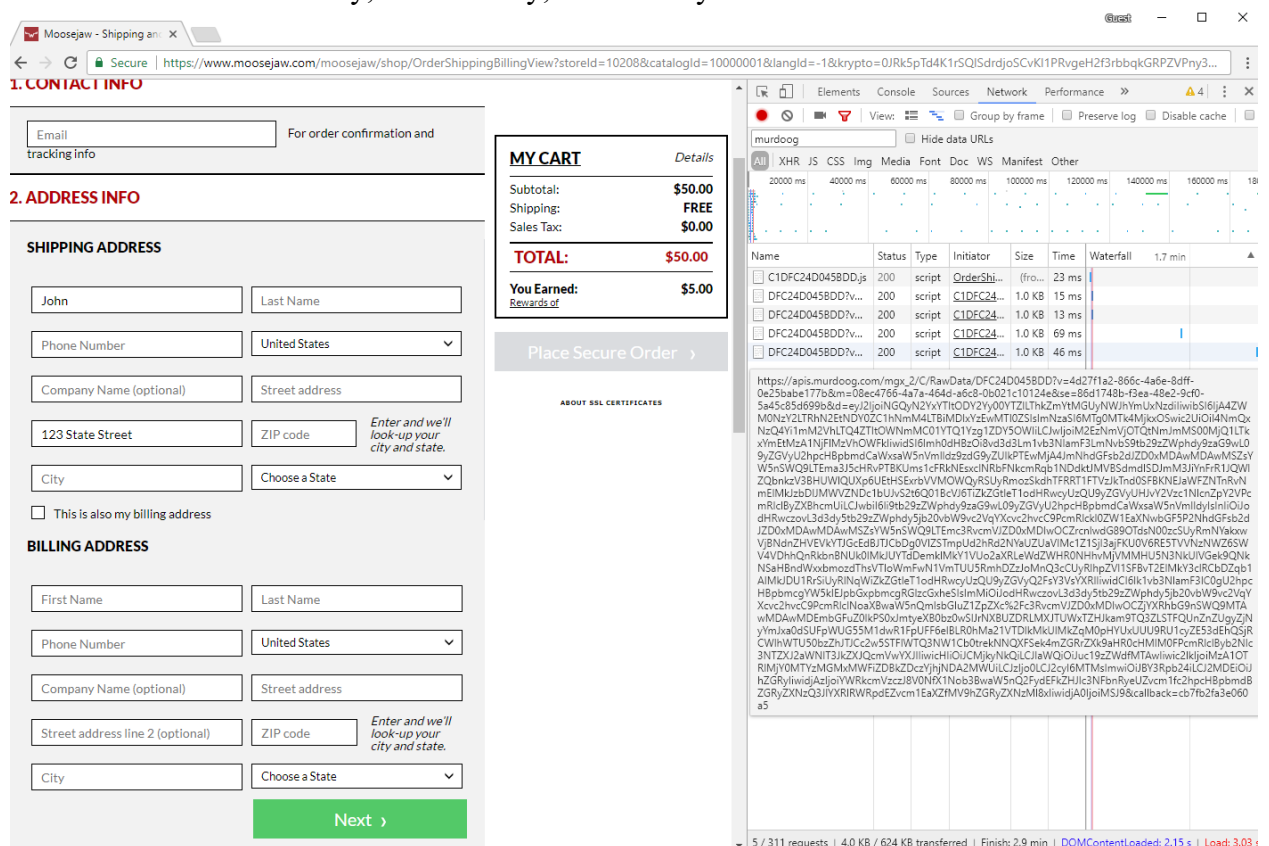
The screenshot displays the Moosejaw checkout page. The header includes the Moosejaw logo, a return policy, and security guarantees. The main content area is divided into sections for contact information, address information, and a shopping cart summary. The contact section includes fields for email and phone number. The address section includes fields for first and last name, phone number, company name, street address, ZIP code, and city. The shopping cart summary shows a subtotal of \$50.00, shipping of \$0.00, and a total of \$50.00. A network developer tool is open on the right side of the browser window, showing a list of requests and their details.

Name	Status	Type	Initiator	Size	Time	Waterfall
C1DFC24D045BDD7v...	200	script	OrderShi...	1.0 KB	23 ms	
DFC24D045BDD7v...	200	script	C1DFC24...	1.0 KB	15 ms	
DFC24D045BDD7v...	200	script	C1DFC24...	1.0 KB	13 ms	

39. Now, the user has entered his name “John.” A transmission is automatically, immediately, and secretly made to NaviStone:

The screenshot displays the Moosejaw checkout page. The left sidebar contains a 'Sign In' button and a link for existing customers. The main content area is divided into two sections: '1. CONTACT INFO' and '2. ADDRESS INFO'. The 'CONTACT INFO' section includes an email input field and a 'For order confirmation and tracking info' link. The 'ADDRESS INFO' section is further divided into 'SHIPPING ADDRESS' and 'BILLING ADDRESS'. Both sections include input fields for first and last names, phone numbers, company names, street addresses, ZIP codes, and cities. A dropdown menu for 'United States' is visible for both sections. A 'Place Secure Order' button is located at the bottom of the address sections. On the right side, a 'MY CART' summary shows a subtotal of \$50.00, free shipping, and a total of \$50.00. A 'You Earned: \$5.00' reward is also displayed. In the background, a network log is visible, showing a list of requests and responses, including a large JSON object representing the shipping and billing information.

40. Now, the user has entered his address at “123 State Street.” Again, another transmission is automatically, immediately, and secretly made to NaviStone:



41. By intercepting these communications, NaviStone is able to learn the identity of the visitor. As NaviStone boasts, it is capable of matching “60-70% of your anonymous site traffic to Postal names and addresses.”¹²

Defendants’ Practice Of Scanning Visitors’ Computers For De-Anonymizing Files

42. In conjunction with – and in addition to – the activities described above, Defendants’ wiretaps also scan visitors’ computers for files that can be used to de-anonymize and identify the visitor.

43. To accomplish this task, Defendants coordinate with additional third-party data brokers, such as Aggregate Knowledge. Aggregate Knowledge maintains a back-end database containing consumers’ real names, addresses, contact information, browsing habits, and other PII.

44. When visiting certain websites partnered with Aggregate Knowledge, such as

¹² *Id.*

1 Kelty.com, a cookie will be placed on the visitor's computer from "AGKN.com." This is not an
 2 ordinary cookie, and has features that consumers would not expect from ordinary cookies. Rather,
 3 the AGKN.com cookie from Aggregate Knowledge contains an identification number for the
 4 visitor, which is linked to an entry in Aggregate Knowledge's back-end database. As the visitor
 5 enters his or her personal information on websites like Kelty.com (*e.g.*, by submitting one's
 6 shipping and billing information), the database is updated with the visitor's real name, address, and
 7 contact information. Entities like Aggregate Knowledge have deployed these cookies on a handful
 8 of participating retail and e-consumer websites.

9 45. In turn, when the user visits Moosejaw.com, Defendants' wiretaps will then scan the
 10 users' computer for cookies, such as AGKN.com, that can be used in conjunction with these third-
 11 party data brokers to de-anonymize and identify the visitor. If such a cookie is found, Defendants'
 12 wiretaps will transmit the cookie and identification number to the data broker (*e.g.*, Aggregate
 13 Knowledge), who will then notify Defendants of the visitor's real name, address, contact
 14 information, and browsing habits.

15 46. In contrast to the AKGN.com cookie, run-of-the-mill cookies that consumers might
 16 be familiar with do not de-anonymize consumers and play no role in monitoring keystrokes and
 17 mouse clicks.

18 **Other Allegations Common To All Claims**

19 47. Defendants, as corporations, are "persons."

20 48. Plaintiff's and Class Members' keystrokes, mouse clicks, and other interactions with
 21 Moosejaw.com are "electronic communications."

22 49. For at least some of the communications at issue, neither Moosejaw nor NaviStone
 23 was an intended recipient of the communication. For example, Mr. Revitch has never made any
 24 purchase from Moosejaw. Thus, any datafiles retrieved from his device, or any information he may
 25 have typed onto forms without clicking submit, or any keystrokes, mouse clicks, or similar touch
 26 gestures intercepted through the wiretaps, were communications with Mr. Revitch's Internet service
 27 provider for the purpose of accessing web content, and were not communications with Moosejaw or
 28 NaviStone. They were not communications to which Moosejaw or NaviStone were intended to be

1 parties.

2 50. At the time Defendants implemented the wiretaps on Moosejaw.com, they intended
3 to commit tortious acts including disclosures of the intercepted information which violated the
4 California Invasion of Privacy Act, Cal. Penal Code §§ 631, 632, and 635; violated the privacy
5 rights under the California Constitution; and violated California's Consumers Legal Remedies Act,
6 Civil Code §§ 1750, *et seq.*

7 51. Defendants' actions complained of herein, including secretly and instantaneously
8 capturing and redirecting the keystrokes, mouse clicks, and other electronic communications of
9 website visitors, are not necessary practices for owners, operators, and developers of Internet
10 websites, nor are they incidental to the act of facilitating a website or e-commerce transactions.
11 None of these actions was undertaken in the ordinary course of business. On the contrary, these
12 actions are contrary to the legitimate expectations of website visitors, and are contrary to established
13 industry norms. So much so that they were the subject of multiple exposés in industry publications,
14 as discussed above.

15 52. Defendants' actions are and have been intentional as evidenced by, *inter alia*, their
16 design and implementation of the software wiretaps on Moosejaw.com, their use of wiretaps to
17 access files on visitors' computers that are unrelated to the Moosejaw.com website, and their
18 disclosures and uses of the intercepted data files and communications for profit.

19 53. Defendants' actions are not part of routine Internet functionality. Wiretaps are not
20 necessary or needed to operate an e-commerce website. The NaviStone code is novel.

21 54. Visitors have a reasonable expectation of privacy when browsing Moosejaw.com, in
22 that they never expect that their keystrokes, mouse clicks, and other electronic communications
23 were being intercepted and disclosed to a third party, or that Defendants would de-anonymize and
24 identify them as a result of their browsing.

25 55. Defendants maintain records of the visitors they have wiretapped and de-
26 anonymized, either through their own computer systems or through third-party contractors.

27 //

28 //

CLASS ACTION ALLEGATIONS

56. Plaintiff seeks to represent a class all persons in the State of California whose electronic or stored communications were intercepted through the use of NaviStone's wiretaps on Moosejaw.com (the "Class").

57. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class number in the millions. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendants.

58. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to, whether Defendants have violated the California Invasion of Privacy Act ("CIPA"), Cal. Penal Code §§ 631, 632, and 635; have invaded Plaintiff's privacy rights in violation of the California Constitution; have intruded upon the seclusion of Plaintiff; have violated California's Consumers Legal Remedies Act, Civil Code §§ 1750, *et seq.*; and have committed other tortious acts as described herein.

59. The claims of the named Plaintiff are typical of the claims of the Class because the named Plaintiff, like all other class members, visited Moosejaw.com and had his electronic communications intercepted and disclosed to NaviStone through the use of NaviStone's wiretaps.

60. Plaintiff is an adequate representative of the Class because his interests do not conflict with the interests of the Class members he seeks to represent, he has retained competent counsel experienced in prosecuting class actions, and he intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and his counsel.

61. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex

1 legal and factual issues of this case. Individualized litigation also presents a potential for
 2 inconsistent or contradictory judgments. In contrast, the class action device presents far fewer
 3 management difficulties and provides the benefits of single adjudication, economy of scale, and
 4 comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment
 5 of the liability issues will ensure that all claims and claimants are before this Court for consistent
 6 adjudication of the liability issues.

7 62. Plaintiff brings all claims in this action individually and on behalf of members of the
 8 Class against Defendants.

9
 10 **COUNT I**
Violation Of The California Invasion Of Privacy Act,
Cal. Penal Code § 631

11 63. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
 12 forth herein.

13 64. Plaintiff brings this claim individually and on behalf of the members of the proposed
 14 Class against Defendants.

15 65. California Penal Code § 631(a) provides, in pertinent part:

16
 17 Any person who ... willfully and without the consent of all parties to
 18 the communication, or in any unauthorized manner, reads, or attempts
 19 to read, or to learn the contents or meaning of any message, report, or
 20 communication while the same is in transit or passing over any wire,
 21 line, or cable, or is being sent from, or received at any place within
 22 this state; or who uses, or attempts to use, in any manner, or for any
 23 purpose, or to communicate in any way, any information so obtained,
 24 or who aids, agrees with, employs, or conspires with any person or
 25 persons to lawfully do, or permit, or cause to be done any of the acts
 26 or things mentioned above in this section, is punishable by a fine not
 27 exceeding two thousand five hundred dollars

28 66. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
 each Defendant intentionally accessed, intercepted, read, learned, and/or collected the electronic
 communications of Plaintiff and Class Members, and procured the other Defendant to do so.

67. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
 reasonable expectation of privacy. Plaintiff and Class Members did not reasonably expect that

Defendants would intentionally access, intercept, read, learn, and collect Plaintiff and Class Members' electronic communications.

68. Plaintiff and Class Members did not consent to any of Defendants' actions in implementing NaviStone's wiretaps on Moosejaw.com. Nor have Plaintiff or Class Members consented to Defendants' intentional access, interception, reading, learning, and collection of Plaintiff and Class Members' electronic communications.

69. Plaintiff and Class Members have suffered loss by reason of these violations, including, but not limited to, violation of the right of privacy and loss of value in their PII.

70. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

71. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured by the violations of Cal. Penal Code § 631, and each seek damages for the greater of \$5,000 or three times the amount of actual damages, as well as injunctive relief.

COUNT II
Violation Of The California Invasion Of Privacy Act,
Cal. Penal Code § 632

72. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

73. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Defendants.

74. California Penal Code § 632(a) provides, in pertinent part:

A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars

75. Defendants are "persons" under the California Invasion of Privacy Act.

76. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com, each Defendant intentionally used an electronic amplifying or recording device to eavesdrop upon

1 and record the confidential communications of Plaintiff and Class Members, and procured the other
2 Defendant to do so.

3 77. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
4 reasonable expectation of privacy. Plaintiff and Class Members did not reasonably expect that
5 Defendants would intentionally use an electronic amplifying or recording device to eavesdrop upon
6 and record the confidential communications of Plaintiff and Class Members.

7 78. Plaintiff and Class Members did not consent to any of Defendants' actions in
8 implementing NaviStone's wiretaps on Moosejaw.com. Nor have Plaintiff or Class Members
9 consented to Defendants' intentional use of an electronic amplifying or recording device to
10 eavesdrop upon and record the confidential communications of Plaintiff and Class Members.

11 79. Plaintiff and Class Members have suffered loss by reason of these violations,
12 including, but not limited to, violation of the right of privacy and loss of value in their PII.

13 80. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

14 81. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured
15 by the violations of Cal. Penal Code § 632, and each seek damages for the greater of \$5,000 or three
16 times the amount of actual damages, as well as injunctive relief.

17 **COUNT III**
18 **Violation Of The California Invasion Of Privacy Act,**
19 **Cal. Penal Code § 635**

20 82. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
21 forth herein.

22 83. Plaintiff brings this claim individually and on behalf of the members of the proposed
23 Class against Defendants.

24 84. California Penal Code § 635 provides, in pertinent part:

25 Every person who manufactures, assembles, sells, offers for sale,
26 advertises for sale, possesses, transports, imports, or furnishes to
27 another any device which is primarily or exclusively designed or
28 intended for eavesdropping upon the communication of another, or
any device which is primarily or exclusively designed or intended for
the unauthorized interception or reception of communications
between cellular radio telephones or between a cellular radio

1 telephone and a landline telephone in violation of Section 632.5, or
 2 communications between cordless telephones or between a cordless
 3 telephone and a landline telephone in violation of Section 632.6 ,
 shall be punished by a fine not exceeding two thousand five hundred
 4 dollars

5 85. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com,
 6 each Defendant intentionally manufactured, assembled, sold, offered for sale, advertised for sale,
 7 possessed, transported, imported, and/or furnished a wiretap device that is primarily or exclusively
 8 designed or intended for eavesdropping upon the communication of another, and procured the other
 9 Defendant to do so.

10 86. NaviStone's code is a "device" that is "primarily or exclusively designed" for
 11 eavesdropping. That is, the NaviStone code is designed to gather PII, including keystrokes, mouse
 12 clicks, and other electronic communications. The NaviStone code is also designed to scan visitors'
 13 computers in search of files that could be used to de-anonymize them.

14 87. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively
 15 reasonable expectation of privacy.

16 88. Plaintiff and Class Members did not consent to any of Defendants' actions in
 17 implementing NaviStone's wiretaps on Moosejaw.com.

18 89. Plaintiff and Class Members have suffered loss by reason of these violations,
 19 including, but not limited to, violation of the right of privacy and loss of value in their PII.

20 90. Unless restrained and enjoined, Defendants will continue to commit such illegal acts.

21 91. Pursuant to Cal. Penal Code § 637.2, Plaintiff and Class Members have been injured
 22 by the violations of Cal. Penal Code § 635, and each seek damages for the greater of \$5,000 or three
 23 times the amount of actual damages, as well as injunctive relief.

24 **COUNT IV**
 25 **Invasion Of Privacy Under California's Constitution**

26 92. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set
 27 forth herein.
 28

93. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Defendants.

94. Plaintiff and Class Members have an interest in: (1) precluding the dissemination and/or misuse of their sensitive, confidential PII; and (2) making personal decisions and/or conducting personal activities without observation, intrusion or interference, including, but not limited to, the right to visit and interact with various Internet sites without being subjected to wiretaps without Plaintiff's and Class Members' knowledge or consent.

95. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com, each Defendant intentionally invaded Plaintiff and Class Members' privacy rights under the California Constitution, and procured the other Defendant to do so.

96. Plaintiff and Class Members had a reasonable expectation that their PII and other data would remain confidential and that Defendants would not install wiretaps on Moosejaw.com.

97. Plaintiff and Class Members did not consent to any of Defendants' actions in implementing NaviStone's wiretaps on Moosejaw.com.

98. This invasion of privacy is sufficiently serious in nature, scope and impact.

99. This invasion of privacy constitutes an egregious breach of the social norms underlying the privacy right.

COUNT V
Invasion Upon Seclusion

100. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

101. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Defendants.

102. At all relevant times, by implementing NaviStone's wiretaps on Moosejaw.com, each Defendant intentionally intruded upon the seclusion of Plaintiff and Class Members, and procured the other Defendant to do so.

103. Defendants' deception was deliberate.

104. When visiting Moosejaw.com, Plaintiff and Class Members had an objectively reasonable expectation of privacy.

105. Plaintiff and Class Members did not consent to any of Defendants' actions in implementing NaviStone's wiretaps on Moosejaw.com.

106. Defendants' intentional intrusion on Plaintiff's and Class Members' solitude or seclusion without consent would be highly offensive to a reasonable person.

COUNT VI
Violation Of California's Consumers Legal Remedies Act,
Civil Code §§ 1750, et. seq.

107. Plaintiff repeats the allegations contained in the foregoing paragraphs as if fully set forth herein.

108. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Defendants.

109. CLRA § 1770(a)(5) prohibits “[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.” Defendants violated this provision by representing that their website and online services have characteristics, uses, and benefits which they do not have.

110. Given that Defendant Moosejaw is a retailer of clothing and outerwear, visitors to Moosejaw.com plainly intend to browse the site to review Moosejaw's clothing and outerwear offerings.

111. During each of these visits, Mr. Revitch browsed Moosejaw.com because he intended to purchase outerwear.

112. At the time Defendants made their misrepresentations and omissions, they were aware that they had installed a wiretap on Moosejaw.com.

113. Plaintiff and Class members suffered injuries caused by Defendants' misrepresentations and omissions because: (a) Plaintiff suffered an invasion of his privacy as a

1 result of Defendants' wiretap on Moosejaw.com, and (b) Plaintiff was deprived of any income that
 2 Defendants generated through their unauthorized use or sale of Plaintiff's data.

3 114. Prior to the filing of this Complaint, a pre-suit notice letter was served on Defendants
 4 that complied in all respects with California Civil Code § 1782(a). On November 9, 2018, Plaintiff
 5 Revitch, by and through his counsel, sent Defendants letters via certified mail, return receipt
 6 requested, advising Defendants they were in violation of the CLRA and must correct, repair,
 7 replace, or otherwise rectify the goods alleged to be in violation of § 1770.

8 115. Pursuant to California Civil Code § 1780(d), attached is an affidavit showing this is
 9 the proper forum.

10 116. Wherefore, Plaintiff seeks compensatory damages, punitive damages, and restitution
 11 of any ill-gotten gains due to Defendants' acts and practices, as well as injunctive relief for this
 12 violation of the CLRA in the form of a Court order requiring Defendants to immediately cease their
 13 wiretap activity and purge their extant data acquired through the wiretaps on Moosejaw.com.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks
 16 judgment against Defendants, as follows:

- 17 a. For an order certifying the Class under Rule 23 and naming Plaintiff as the
 18 representative of the Class and Plaintiff's attorneys as Class Counsel to represent the
 19 Class;
- 20 b. For an order declaring that the Defendants' conduct violates the statutes referenced
 21 herein;
- 22 c. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;
- 23 d. For compensatory, punitive, and statutory damages in amounts to be determined by
 24 the Court and/or jury;
- 25 e. For prejudgment interest on all amounts awarded;
- 26 f. For an order of restitution and all other forms of equitable monetary relief;
- 27 g. For injunctive relief as pleaded or as the Court may deem proper; and

1 h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and
2 expenses and costs of suit.

3 **DEMAND FOR TRIAL BY JURY**

4 Plaintiff demands a trial by jury of all issues so triable.

5 Dated: May 22, 2019

Respectfully submitted,

6 **BURSOR & FISHER, P.A.**

7 By: /s/ L. Timothy Fisher
8 L. Timothy Fisher

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